

Supreme Court, U. S.
FILED

AUG 13 1976

MICHAEL RADAK, JR., CLERK

No. 75-1720

In the Supreme Court of the United States

OCTOBER TERM, 1976

NEIL T. NAFTALIN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner contends that a delay of four and one-half years between the time the government first obtained knowledge of his conduct and the time an indictment was returned against him—engendered primarily by the Securities and Exchange Commission (SEC) policy of pursuing civil and administrative remedies prior to referring cases to the Justice Department for possible criminal prosecution—denied him due process and requires dismissal of the indictment.

I. On April 11, 1974, petitioner was indicted in the United States District Court for the District of Minnesota on eight counts of securities fraud, in violation of Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a). After an evidentiary hearing, the district court dismissed the indictment on the ground that delay in its procurement violated petitioner's Fifth

Amendment right to due process (Pet. App. A-14 to A-18). The court of appeals reversed and ordered the indictment reinstated (Pet. App. A-1 to A-10).¹

The facts upon which the indictment is based are essentially as follows (see Pet. App. A-2 to A-3): Petitioner, the president and majority stockholder of a stock-trading company, had engaged in the practice of selling shares of stock he did not own at a time when he estimated the stocks to be at their peak value. He would then purchase shares as the stock declined, to meet his orders for the sold shares. The system, which depended upon his credit in the industry and his accurate predictions of the market, collapsed when he misjudged a stock, which rose in value rather than declined after his "sale." These essential facts became known on October 27, 1969, when petitioner admitted them at a meeting he convened with broker/dealers to whom he had contracted to sell stock that he could not deliver. Two days later petitioner conveyed this same information to the SEC. As the result of further investigation—including auditing petitioner's books and obtaining written responses to questionnaires sent to broker/dealers with whom petitioner had dealt—the SEC learned all of the essential facts underlying the indictment by December 1969.

¹The opinion was twice amended *sua sponte* by the court. These amendments are found at Pet. App. A-11 and Supp. Pet. App. SA-1 to SA-3. The second amendment was made the day after the petition was filed. Petitioner thereupon petitioned the court of appeals for rehearing with suggestion of rehearing *en banc* (Supp. Pet. App. SA-4 to SA-12) and filed a supplement to his petition requesting that consideration of this case be deferred until the court of appeals ruled on the petition for rehearing (Supp. Pet. 2). The petition for rehearing was denied on June 21, 1976.

In accordance with an established SEC policy of pursuing civil and administrative remedies before recommending criminal prosecution, the agency pursued such non-criminal remedies until June 19, 1973. The proceedings resulted in issuance of a permanent injunction, institution of a receivership initiated by the SEC for the assets of petitioner's company, involuntary bankruptcy proceedings brought by two groups of broker/dealers victimized by petitioner, and administrative action barring petitioner from the securities industry until such time as his reinstatement would be consistent with the public interest. On March 8, 1974, the matter was referred to the Justice Department for criminal action.² Petitioner was indicted a little over a month later.

The district court was unable to identify any prejudice to petitioner's defense caused by the pre-indictment delay, but it found that he had suffered by being unable to offer mitigating testimony at the administrative proceedings (out of fear of self-incrimination) and by living for four and one-half years not knowing whether he would be criminally prosecuted (Pet. App. A-16). Relying on the reference to "outrageous cases of unjustified delay" as a ground for dismissal in *United States v. Jackson*, 504 F. 2d 337, 339 n. 2 (C.A. 8) (see Pet. App. A-29 to A-30), the district court held that the delay in this case, although not substantially prejudicing petitioner's defense, was nonetheless so unreasonable as to constitute a violation of due process (Pet. App. A-16).

²The government conceded below that the nine-month delay between June 1973 and March 1974 was unnecessary, but the court below agreed that the lapse was not intentional, characterizing it as due to "the wheels of government * * * [grinding] with agonizing slowness" (Pet. App. A-9).

The court of appeals reversed. It held that the reference to "outrageous delay" in *Jackson* was limited to "ill-motivated attempts by the Government to weaken the accused's defense by long delay" (Pet. App. A-8), a finding which in this case the district court did not make and which the record would not in any event support (Pet. App. A-8 to A-9). Concluding that no prejudice to petitioner's criminal case had been demonstrated (Pet. App. A-7 to A-10), the court of appeals ordered the indictment reinstated.³

2. We have petitioned for a writ of certiorari in *United States v. Lovasco*, No. 75-1844, petition filed June 21, 1976, to review both the rule adhered to by the Eighth Circuit that pre-accusation delay prejudicing the defense and not affirmatively justified by the government is sufficient—without a showing that the government sought the delay to secure an improper tactical advantage—to predicate a finding of a Fifth Amendment due process violation, and that court's explicit approval of the trial court's finding, made prior to trial, that the delay had prejudiced the defense.⁴ There is no reason, however, to hold this case pending disposition of the petition in *Lovasco*. Here the court, applying the rule which we contest in *Lovasco*, and making its assessment prior to trial, has concluded (as did the district court) that

³In response to the district court's conclusion that the delay had impaired petitioner's defense at the administrative proceedings, the court of appeals correctly pointed out that such a claim should properly have been raised during those same civil proceedings. As to petitioner's "burden of uncertainty" during that four and one-half year lapse, the lower court properly noted that such a consideration is applicable only to the Sixth Amendment right to a speedy trial following formal accusation (Pet. App. A-8).

⁴See our petition in *Lovasco* at pp. 10-11. We are sending a copy of that petition to petitioner here.

demonstrable prejudice was not shown; hence, whatever disposition this Court may make of *Lovasco*, the holding of the court of appeals in this case would not be affected.

Petitioner contends that pre-accusation delay not affirmatively justified by the government is sufficient—without a showing of *either* prejudice to the defense *or* deliberate and tactically motivated delay—to require dismissal of the indictment. That contention is, we submit, plainly inconsistent with this Court's decision in *United States v. Marion*, 404 U.S. 307, and is also unsupported by subsequent appellate interpretations of *Marion*. In *Marion* this Court held that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections of the speedy trial provision of the Sixth Amendment" (404 U.S. at 320). While acknowledging that pre-accusation delay might in some instances violate the Due Process Clause of the Fifth Amendment and require dismissal of an indictment, the Court referred approvingly to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's] right[] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted). Neither of those factors has been shown here.⁵

⁵Petitioner's second contention—that the SEC violated his due process rights by its policy of pursuing civil and administrative remedies prior to referring the case for criminal prosecution—does not in any practical way differ, in the context of this criminal appeal, from his first. The claim that he was prejudiced in the conduct of independent civil proceedings should afford no independent grounds for relief here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.